TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 218.

THE MERCHANTS' NATIONAL BANK OF LITTLE ROCK,
PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ~~MASSACHUSETTS.~~ Arkansas

FILED OCTOBER 4, 1877.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eastern district of Arkansas, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, between The United States, plaintiff, and The Merchants' National Bank of Little Rock, Arkansas, a manifest error hath happened, to the great damage of the said defendant, as is said, and as appears by her complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 22d day of December, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the hundred & first.

[SEAL.] RALPH L. GOODRICH,
Clerk of the Circuit Court of the United States of America for the Eastern District of Arkansas.

Allowed by—

HENRY C. CALDWELL,
Judge U. S. for East. Dist. Ark.

2 The execution of this writ of error appears by the schedule hereto annexed.

RALPH L. GOODRICH, *Clerk.*

JANUARY 25, 1877.

I hereby acknowledge and accept service, on behalf of the United States, of the within writ of error, at the city of Little Rock, Arkansas, this 22d day of December, A. D. 1876.

J. H. DOOLEY,
Acting U. S. Att'y Eastern District of Arkansas.

T. D. W. YONLEY,
Special Att'y for U. S.

(Indorsed:) Filed December 22, 1876. Ralph L. Goodrich, clerk.

3 Be it remembered that on January 18th, 1876, came into the clerk's office of the circuit court of the United States for the eastern district of Arkansas S. R. Harrington, esq., district attorney, and filed therein a complaint at law against the Merchants' National Bank of Little Rock, which complaint is in the words and figures following, to wit:

Complaint.

The plaintiff, the United States, by S. R. Harrington, her attorney, complains of the defendant, the Merchants' National Bank of Little Rock, Arkansas, a corporation organized under the laws of the United States, and doing business at Little Rock, in said eastern district of Arkansas, and for cause of action states:

That during the years A. D. 1870, A. D. 1871, A. D. 1872, and A. D. 1873, the said defendant, at Little Rock aforesaid, being then and there a national banking association as aforesaid, did pay out the notes of the city of Little Rock to the amount of one million and six hundred thousand dollars ($1,600,000), said notes then and there having been executed by said city for the payment of the various sums of one dollar, two dollars, three dollars, five dollars, ten dollars, and twenty dollars each, whereby, and by reason of section 2 of the act of Congress entitled "An act to exempt wrapping-paper made from wool or cornstalks from internal tax, and for other purposes," approved March 26th, A. D. 1867, and by section 3413 of the Revised Statutes of the United States, said defendant became indebted to and liable to pay to the plaintiff a tax of ten per centum on the amount of said notes so paid out as aforesaid, to wit, ten per centum on the said $1,600,000 *dollars*, being the sum of one hundred and sixty thousand dollars ($160,000).

That said defendant has not paid to said plaintiff said sum, or any part thereof, though often requested so to do; that said sum of $160,000 *dollars* is now justly due from said defendant to said plaintiff for the said tax so due as aforesaid.

Wherefore plaintiff prays judgment for the said sum of $160,000 *dollars*, and such other relief as the nature of the case may demand.

S. R. HARRINGTON,
U. S. Attorney East. Dist. of Ark's.

Filed and writ issued January 18, 1876.

RALPH L. GOODRICH, *Clerk.*

On which complaint a writ of summons was issued, which is in the words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Arkansas:

The President of the United States to the marshal of the eastern district of Arkansas, greeting:

You are hereby commanded to summon Merchants' National Bank of Little Rock, if it be found within your district, to appear be-
4 fore the judges of our circuit court of the United States in and for the eastern district of Arkansas, at the United States court-room, in the city of Little Rock, on the first day of our next April term, 1876, to answer a complaint filed against it in said court by the United States, and warn it that upon its failure to answer the complaint will be taken for confessed; and have you then and there this writ, with the manner of execution hereof indorsed hereon.

In testimony whereof, Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, has caused the seal of said circuit court to be hereunto affixed, this 18th day of January, A. D. 1876, and on the 100th year of our Independence.

Attest:
[L. S.] RALPH L. GOODRICH, *Clerk.*

In obedience to the within writ, I have summoned the within named Merchants' National Bank by delivering a true and correct copy of the same to Logan H. Roots, president of said bank, at Little Rock, in the eastern district of Arkansas, on this 8th day of February, A. D. 1876.

JAMES TORRANS,
U. S. Marshal.
By DANIEL H. WOODARD,
Deputy Marshal.

Returned and filed Feb'y 23, 1876.

RALPH L. GOODRICH, *Clerk.*

Be it remembered that at a circuit court of the United States of America in and for the the eastern district of Arkansas, begun and holden on Monday, the tenth day of April, anno Domini one thousand eight hundred and seventy-six, at the United States court-room in the city of Little Rock, Arkansas, the honorable John F. Dillon, judge of the circuit court of the United States for the eighth judicial circuit, presiding, and the honorable Henry C. Caldwell, district judge, and holding said court, the following proceedings were had, to wit:

UNITED STATES
v.
MERCHANTS' NATIONAL BANK OF LITTLE ROCK.

Comes the defendant, by John McClure, esq, its attorney, and files herein its demurrer to the complaint.

Which demurrer is in the words and figures following, to wit:

The defendant, the Merchants' National Bank of Little Rock, Ark's, demurs to the complaint herein, and for cause of demurrer says:

First. That the court has no jurisdiction of the subject of this action.

Second. That the complaint herein does not state facts sufficient to constitute a cause of action.

JOHN McCLURE,
Att'y for Def't.

Filed April 10th, 1876.

RALPH L. GOODRICH, *Clerk.*

And on April 12th, A. D. 1876, as follows:

Comes the United States, by S. R. Harrington, esq., district attorney, and T. D. W. Yonley, esq., and comes the defendant, by John McClure, esq., her attorney, and the court being now well advised of the matters arising on the demurrer to the complaint herein, considers that the same be overruled, and it is ordered by the court that the said defendant file herein her answer by Friday morning next.

And on April 14th, A. D. 1876, as follows:

Comes the defendant, by John McClure, esq., her attorney, and files herein her answer.

And on May 25th, A. D. 1876, as follows:

Comes the defendant, by John McClure, esq., her attorney, and files herein her amended answer.

Which amended answer is in the words and figures following, to wit:

1. The Merchants' National Bank of Little Rock, Arkansas, the defendant herein, for answer to the complaint filed herein, saith:

First. Defendant denies that it paid out $1,600,000 or any other amount of the notes of the city of Little Rock during the years alleged in the complaint herein, upon which the plaintiff is entitled or the defendant liable to a tax of ten per centum.

Second. Defendant denies that it is indebted to or liable to pay to the plaintiff the sum of $160,000, or any other sum of money, as a tax on the notes of the city of Little Rock.

Third. Defendant denies that the city of Little Rock ever executed notes which could have been paid out by defendant, or which was subject to taxation by the plaintiff.

Fourth. Defendant denies that a demand was ever made upon it for the whole or any portion of the tax demanded in the complaint herein, by any officer or person authorized by law to collect and receive the same.

2. The defendant, for further answer to the complaint herein, saith:

First. That the city of Little Rock, prior to the 26th day of March, A. D. 1867, was and now is and has at all times since said 26th day of March, 1867, been a municipal corporation organized and existing under the constitution and laws of the State of Arkansas, and by said State used as a means and instrumentality for the public administration of justice, the preservation of public peace, the dissemination of knowledge, and the welfare of the citizens thereof, and constituted a part and portion of the sovereignty and government of said State.

Second. That as such government the city of Little Rock was, among other things, fully authorized and empowered by the public laws of said State of Arkansas to purchase, build, establish, and maintain schools and school houses, to establish and maintain a city police and police court, a board of health, markets and market places, levees, wharves, docks, piers, and landing places, and to purchase grounds for any of the purposes aforesaid; to provide a supply of water for said city by the construction of wells, cisterns, pumps, and reservoirs, and by the purchase and erection of water works; to establish and maintain a fire department; to open, widen, lay off, extend, straighten and establish
6 streets and alleys, and keep the same in order and repair; to light streets and alleys, public grounds, and landing and market places; to open, construct, and keep in order sewers and drains, and appropriate land and material for that purpose; to borrow money, and execute bonds and other evidences of debt for the payment thereof, and by taxation to pay any and all expenses and debts incurred in and about the execution of any and all the powers herein enumerated and granted by law, as well as the payment of the officers, persons, and agents employed by said municipal corporation.

Third. That said city of Little Rock was without sufficient revenue in its treasury to pay all of its current expenses as fast as incurred in the exercise and execution of its corporate powers, and being authorized to contract debts for the objects mentioned in the preceding paragraph, and levy taxes for the payment of the same, said city by its council from time to time, as the exigency of the case demanded, or as in the opinion of the council of said city the same was either prudent, expedient, or necessary, authorized the execution and issuing of bonds and certificates of indebtedness to be used in the payment and satisfaction of the indebtedness of said city.

Fourth. Defendant alleges that the bonds and certificates of indebtedness so issued as aforesaid, and as hereinafter described, are described, or rather misdescribed, in the complaint herein as "notes of the city of Little Rock."

Fifth. That all of the bonds and certificates of indebtedness issued by order of the corporate authority of the city of Little Rock were used by said city and municipal corporation in the payment and satisfaction of debts contracted by said city for the purchase of sites for schoolhouses, the building of houses thereon, the support of schools therein, the taking up and paying off and extending the time of payment of the interest coupons of the bonded debt of said city then due and as the same became due, and in the payment and as a means of extending the time of payment of other indebtedness of said city, and to take up the maturing bonds of said city and other obligations thereof, and in the payment and satisfaction of certain of its creditors who were willing to accept the same in payment of debts due them, and to whom said city was indebted on account of labor and services performed and material and means furnished said city in the execution of some of its enumerated corporate powers.

Sixth. That said bonds and certificates of indebtedness were issued and made payable in one, two, three, four, five, six, seven, eight, nine, and ten years after the date thereof, with interest at the rate of eight per cent. per annum.

Seventh. That all of said bonds and certificates of indebtedness executed as aforesaid, in the manner and for the purpose hereinbefore and hereinafter stated, by the corporate authorities of the city of Little Rock, represented only an amount and value of services performed, labor rendered, and material and means furnished said municipal corporation at its request by some person or persons in the execution of some one of its enumerated powers, which said amount had been duly audited and allowed by the corporate authorities of said city and ordered paid as a just and valid claim against said city, and represented no other consideration whatever.

Seventh. That said bonds and certificates of indebtedness were not issued and paid out by said city of Little Rock except in the payment and discharge of a debt of said city. That the same was not issued as a circulating medium or for the purpose of profit or gain, but as a medium and means of enabling the corporate authorities of said city to
7 fully execute and exercise the powers enumerated and conferred by law, and without which and the use of which public improvements would have been retarded, schools could not have been established, streets have been kept in repair and lighted, and the peace, comfort, prosperity, and welfare of the city promoted.

Eighth. That the bonds and certificates of indebtedness executed as aforesaid for the purposes and in the manner aforesaid by the corporate authorities of said city of Little Rock were executed merely as evidences of debt and only for an amount confessedly due from said municipal corporation to the person therein named, which said debt had theretofore been duly allowed by the corporate authorities thereof as a just, valid, and subsisting debt of said city, contracted in the exercise only of functions strictly belonging to said city in its ordinary governmental capacity, and which had been ordered paid by the corporate authorities of said city.

Ninth. That said bonds and certificates of indebtedness so executed and delivered as aforesaid represented, regardless of the words employed therein and regardless of form, only an unpaid and outstanding indebtedness of the city of Little Rock, which it had contracted and incurred in the exercise only of functions strictly belonging to its ordinary governmental and municipal capacity, as a municipal corporation of the State of Arkansas, and which had been accepted by some creditor of said city

in satisfaction and payment of a debt justly due the person or persons therein named.

Eleventh. That said bonds and certificates of indebtedness, executed in the manner and for the purposes aforesaid, and which are described in the complaint herein as "notes of the city of Little Rock," are not subject to taxation by the plaintiff.

Twelfth. That the tax sought to be collected by the plaintiff from this defendant under the pretense that the bonds and certificates of indebtedness hereinbefore described are "notes of the city of Little Rock," is a tax upon the contracts, obligations, and securities issued by a municipal corporation created and existing under the constitution and laws of the State of Arkansas, and used and employed by said State as an instrumentality and means to enforce its laws, provide schools, and administer to the peace, comfort, safety, happiness, and prosperity of its citizens, all of which said bonds, certificates of indebtedness, contracts, obligations, and securities, now sought to be taxed under the pretense that the same are "notes of the city of Little Rock," are and were a means and instrumentality devised and used by said municipal corporation to aid in the exercise only of functions strictly belonging to said city in its ordinary governmental and municipal capacity; defendant therefore saith that no matter by what name said bonds and certificates of indebtedness so issued as aforesaid may be called, that the same are contracts and obligations of a municipal corporation existing under the constitution and laws of the State of Arkansas, issued in the exercise and for the payment of debts contracted by said city in the execution of functions belonging to it in its ordinary governmental and municipal capacity, and that the act imposing a tax of ten per centum on such contracts and obligations is unconstitutional, null, and void.

3. The defendant, for further answer to the complaint herein, saith:

First. That the city of Little Rock is a municipal corporation of the State of Arkansas, created under the constitution and laws thereof, and has been continuously so since the 26th of March, 1867, down to the present time.

Second. Defendant states that it has no knowledge of the city
8 of Little Rock having issued notes, and denies that the notes of said city was by it, the defendant, paid out.

Third. That the corporate authority of said city was fully authorized under the laws of the State of Arkansas to make notes, and that if any such notes as are described in the complaint herein were executed by said city, it was only as a means to enable it to discharge its governmental and municipal functions, and in payment and satisfaction of debts and obligations contracted by said city in the discharge of its said governmental and municipal functions aforesaid, and for no other use or purpose whatever.

Third. Defendant therefore saith that if any such notes as are described in the complaint herein were at any time issued by said city, that such notes were not by law taxable by the plaintiff, no matter by whom the same were paid out and circulated, as such tax would be and is a tax upon a means used, and the contracts of a municipal corporation made, in the exercise and execution of its corporate powers and in the discharge of its municipal and governmental functions, and the act imposing said tax is unconstitutional, null, and void.

McCLURE AND BROWN.

Filed May 25th, 1876.

RALPH L. GOODRICH, *Clerk.*

And on May 27th, A. D. 1876, as follows:

Comes the United States, by S. R. Harrington and T. D. W. Yonley, and comes the defendant, by John McClure, her attorney, and by consent the original answer filed herein is withdrawn, and the answer filed on the 25th instant to stand as the answer in the case, and the plaintiff, by her said attorneys, file herein her amended complaint and her demurrer to the answer.

Which amended complaint is in the words and figures, to wit:

And the said plaintiff, by leave of the court for that purpose first had and obtained, brings this her amendment to her original complaint herein, and thereupon the said plaintiff, by S. R. Harrington, her attorney, complains of the Merchants' National Bank of Little Rock, Arkansas, a corporation and national banking association organized under the laws of the United States, and domiciled and doing business at the city of Little Rock, to wit, at the district aforesaid, for that during the years 1870, 1871, 1872, and 1873, to wit, at the district aforesaid, the defendant, then and there being a corporation and banking association, did pay out the notes of the city of Little Rock to the amount of one million six thousand dollars, said notes having been then and there issued by said city of Little Rock, upon bank-note paper, in denominations of one, two, five, ten, twenty, fifty, and one hundred dollars, payable to a person therein mentioned or to bearer, and which had been issued and paid out and put into circulation by said city, and which was then and there being passed and used in business and commercial transactions as currency, whereby and by force of section 2 of the act of Congress entitled "An act to exempt wrapping-paper made of wool or corn-stalks from internal tax, and for other purposes," approved March 26th, 1867, and by section 3413 of the Revised Statutes of the United States, said defendant became indebted and liable to pay to the said plaintiff a tax of ten per centum on the amount of said notes of the said city of Little Rock so paid out by the said defendant as aforesaid, to wit, ten per centum on the said $1,600,000, being the sum
9 of $160,000. That said defendant has not paid to the said plaintiff said sum of money or any part thereof, though often requested so to do; that said sum of one hundred and sixty thousand dollars is justly due from said defendant to the said plaintiff for said tax so due as aforesaid; wherefore the said plaintiff prays judgment for the said sum of one hundred and sixty thousand dollars, and for other and proper relief.

S. R. HARRINGTON,
U. S. Att'y.

Filed May 27th, 1876.

RALPH L. GOODRICH, *Clerk.*

And which demurrer to *to* the answer is in the words and figures following, to wit:

And comes the said plaintiff, by S. R. Harrington, her attorney, and demurs to the said second and third defences by said defendant in his said answer pleaded, except so much of the second paragraph of said third defence as denies that said defendant paid out notes of said city of Little Rock, and for cause of demurrer shows first:

First. That the facts stated therein are not sufficient in law to bar or preclude the said plaintiff from having and maintaining her aforesaid action against the said defendant.

Second. The said defendant has not in and by its said defences denied

the facts stated in said plaintiff's complaint, or alleged or shown any matter of fact in avoidance of plaintiff's right of recovery, but that said defences, except as to the said second paragraph of said third defence, consists altogether of matter of law, upon which no apt or material issue can be taken.

Wherefore plaintiff prays judgment, &c.

S. R. HARRINGTON,
U. S. Att'y.

Filed May 27th, 1876.

RALPH L. GOODRICH, *Clerk.*

And on October 18th, A. D. 1876, as follows:

And now, the court being well and sufficiently advised on the law arising on the plaintiff's demurrer to the second and third defences set up in the defendant's answer, except so much of the second paragraph of the third defence as denies the defendant paid out the notes of the city of Little Rock, doth sustain said demurrer.

Be it remembered that at a circuit court of the United States of America in and for the eastern district of Arkansas, begun and holden on Monday, the 23d day of October, anno Domini one thousand eight hundred and seventy-six, at the United States court-room in the city of Little Rock, Arkansas, the honorable Henry C. Caldwell, district judge, presiding and holding said court, the following proceedings were had, to wit:

And on November 9th, A. D. 1876, as follows:

Comes the United States, by Charles C. Waters, esq., district attorney, and by T. D. W. Yonley, esq., and comes the defendant, by John McClure and B. C. Brown, esq's, and both parties announcing themselves ready for trial, a jury came, to wit: J. A. B. Bingham, W. H. Blackwell, W. C. Knight, A. D. Meeks, Wiley B. Stuart, William Sandlin, A. P. Boon, J. J. Gillis, W. P. Davison, W. D. Leiper, F. B. Coleman, and W. G. Bender, being twelve good and lawful men of the district, who were duly tried, empannelled and sworn well and truly to try the issues joined between the plaintiff and defendant, and a true verdict give according to the law and the evidence, and the trial hereof not being concluded, the same is continued until to morrow morning.

And on November 10th, A. D. 1876, as follows:

UNITED STATES
v.
MERCHANTS' NATIONAL BANK OF LITTLE ROCK.

Comes the United States, by P. C. Dooley, esq., acting district attorney, and by T. D. W. Yonley, esq., and files herein her motion to compel the defendant to produce here in court certain books; and comes the defendant, by John McClure and B. C. Brown, esqs., her attorneys; and come the jury, to wit, J. A. B. Bingham, W. H. Blackwell, W. C. Knight, A. D. Meeks, Wiley B. Stuart, William Sandlin, A. P. Boone, J. J. Gillis, W. P. Davison, W. D. Leiper, F. B. Coleman, and W. G. Bender; and the trial hereof not being concluded on yesterday, the same is now resumed, and the trial hereof not being concluded, the same is continued until to-morrow morning.

Which motion is in the words and figures following, to wit:

The United States, by this her petition, respectfully shows unto your honors that, on the day of , 1876, the said United States brought her suit at law in this honorable court against the Merchants' National Bank of Little Rock to the April term, 1876, of this honorable court, to recover the sum of one hundred and sixty thousand dollars claimed by the United States to be due her from the said Merchants' National Bank under the provisions of sec. 2 of an act of Congress entitled "An act approved March 26, 1867," being a tax of ten per centum on the notes of the city of Little Rock, alleged to have been paid out by said Merchants' National Bank between the 1st day of January, 1870, and the 1st day of January, 1874, and which cause is now on trial in this court.

That the said Merchants' National Bank, the defendant therein, has by her answer put in issue the facts relied on by the United States for a recovery against said bank; that the said Merchants' National Bank, defendant in said suit, has in her possession and power certain books and writings, which contain evidence pertinent on behalf of the United States, plaintiff in said suit, to the issues in said suit joined, that is to say, pertinent to prove what amount of the notes of the city of Little Rock were paid out by the said Merchants' National Bank during the time in the complaint of the United States in said suit at law alleged, to wit, the individual and private journals, ledgers, books, discount books, bills receivable and bills payable, books, blotter-books, cash-books, and daily balance-books, in and upon which the transactions of said bank were kept between the 1st day of January, 1870, and the 1st day of January, 1874.

Wherefore the United States, plaintiff in said suit at law, at so as aforesaid depending in this honorable court against said Merchants' National Bank, defendant therein, moves this honorable court to order and require said Merchants' National Bank, defendant in said suit at law, to produce here in court, on the 11th day of November instant, and from day to day until said trial shall be concluded, the books and writings aforesaid in the possession and power of said bank as aforesaid, in order that the same or such part thereof as may be pertinent to the issue joined therein may be used and introduced as evidence on the trial of said cause on the behalf of the United States.

C. C. WATERS,
U. S. Att'y,
YONLEY,
Special Att'y.

11 And on November 11th, A. D. 1876, as follows:

UNITED STATES
v.
MERCHANTS' NATIONAL BANK OF LITTLE ROCK.

Comes the United States, by P. C. Dooley, esq., acting district attorney, and by T. D. W. Yonley, esq., her attorneys; and comes the defendant, by John McClure and B. C. Brown, esqs., her attorneys; and come the jury, to wit, J. A. B. Bingham, W. H. Blackwell, W. C. Knight, A. D. Meeks, Wiley B. Stuart, William Sandlin, A. P. Boone, J. J. Gillis, W. P. Davison, W. D. Leiper, F. B. Coleman, and W. G. Bender; and the trial hereof not being concluded on yesterday, the same is now resumed; and the trial hereof not being concluded, the same is continued until Monday morning.

And on November 13th, A. D. 1876, as follows:

UNITED STATES
v.
MERCHANTS' NATIONAL BANK OF LITTLE ROCK.

Comes the United States, by P. C. Dooley, esq., acting district attorney, and by T. D. W. Yonley, esq.; and comes the defendant, by John McClure and B. C. Brown, esqs., her attorneys; and the court being now well and sufficiently advised of the matters arising on the plaintiff's motion to compel the defendant to produce here in court certain books, considers that said motion be sustained, and thereupon the defendant produces in court here the books referred to, now in her custody and under her control; and come the jury, to wit, J. A. B. Bingham, W. H. Blackwell, W. C. Knight, A. D. Meeks, Wiley B. Stuart, William Sandlin, A. P. Boone, J. J. Gillis, W. P. Davison, W. D. Leiper, F. B. Coleman, and W. G. Bender; and the trial hereof not being concluded on Saturday, the same is now resumed; and the trial hereof not being concluded, the same is continued until to-morrow morning.

And on November 14th, A. D. 1876, as follows:

UNITED STATES
v.
MERCHANTS' NATIONAL BANK OF LITTLE ROCK.

Comes the United States, by P. C. Dooley, esq., acting district attorney, and by T. D. W. Yonley, esq.; and comes the defendant, by John McClure and B. C. Brown, esqs., her attorneys; and come the jury, to wit, J. A. B. Bingham, W. H. Blackwell, W. C. Knight, A. D. Meeks, Wiley B. Stuart, William Sandlin, A. P. Boone, J. J. Gillis, W. P. Davison, W. D. Leiper, F. B. Coleman, and W. G. Bender; and it being made to appear to the court that one of the jurors empannelled to try this cause, to wit, W. C. Knight, by reason of sickness, was unable to sit in the trial of this cause, the further hearing thereof is hereby continued until to-morrow morning.

And on November 15th, A. D. 1876, as follows:

UNITED STATES
v.
MERCHANTS' NATIONAL BANK OF LITTLE ROCK.

Comes the United States, by P. C. Dooley, esq., acting district attorney, and by T. D. W. Yonley, esq.; and comes the defendant, by John McClure and B. C. Brown, esqs., attorneys; and comes J. A. Bingham, W. H. Blackwell, A. D. Meeks, Wiley B. Stuart, A. P. Boone, J. J. Gillis, W. P. Davison, W. D. Leiper, F. B. Coleman, and W. G. Bender, of the jury empannelled to try this cause, was still unable to
12 sit in the trial hereof, and that William Sandlin, also one of the jury empannelled to try this cause, had been by the court permitted to visit his home on account of a death in his family, the further hearing of this cause is hereby continued until Friday morning next.

And on November 17th, A. D. 1876, as follows:

UNITED STATES
v.
MERCHANTS' NATIONAL BANK OF LITTLE ROCK.

Comes the United States, by P. C. Dooley, esq., acting district attorney, and by T. D. W. Yonley, esq., and comes the defendant, by John McClure and B. C. Brown, esqs., her attorneys, and come J. A. B. Bingham, W. H. Blackwell, A. D. Meeks, Wiley B. Stuart, A. P. Boone, J. J. Gillis, W. P. Davison, W. D. Lieper, F. B. Coleman, W. G. Bended, and W. C. Knight, eleven of the jurors herein; and it appearing to the court that William Sandlin having been heretofore excused on account of a death in his family, and this cause continued till this day, and the said William Sandlin not appearing, by consent of parties it is ordered that the trial hereof progress with the said eleven jurors, whose findings and verdict shall operate and have the same force and effect, to all intents and purposes, as if said findings were had and said verdict found and rendered by twelve jurors, and the trial hereof not being concluded on Wednesday, the same is now resumed, and the jury, having heard all the evidence and argument of counsel, and being charged and instructed by the court, retired to consult of their verdict.

And on November 18th, A. D. 1876, as follows:

UNITED STATES
v.
MERCHANTS' NATIONAL BANK.

Comes the United States, by P. C. Dooley, esq., acting district attorney, and by T. D. W. Yonley, esq., and comes the defendant, by John McClure and B. C. Brown, esqs., her attorneys, and come the jury, to wit, J. A. B. Bingham, W. H. Blackwell, A. D. Meeks, Wiley B. Stuart, A. P. Boone, J. J. Gillis, W. P. Davison, W. D. Leiper, F. B. Coleman, W. G. Bender, and W. C. Knight, and return into court the following verdict: We the jury find the issues for the plaintiff, and assess her damages at two thousand dollars.

It is therefore ordered, considered, and adjudged that said plaintiff do have and recover of and from said defendant the sum of two thousand dollars ($2,000), assessed as aforesaid, together with all her costs in and about this suit laid out and expended, and have execution therefor.

And comes the defendant by her said attorneys and files herein her motion for taxation of costs.

Which motion is in the words and figures following, to wit:

The defendant moves the court to tax the costs incurred by the summoning, attendance, and examination of all the witnesses for plaintiff, except Lewis Rau, M. A. Cohn, D. H. Barnes, S. A. Wiggins, John Agery, James R. Roland, L. P. Robbins, Thomas H. Jones, L. L. Thompson, W. J. Patton, P. C. Emery, J. R. Berry, R. R. Thornton, John D. Adams, John Howe, George McLean, M. W. Benjamin, M. L. Rice, Isaac Huyck, R. G. Jennings, D. P. Upham, J. W. Smith, J. L. Hodges, Chas. Withal, Arnold Syberg, and Thomas Harding, to the plaintiff, and for cause therefor shows that many of the witnesses summoned by the

plaintiff were not examined or called to testify by the plaintiff;
13 and that of those who were examined by the plaintiff none but those above named knew anything of the matters in controversy, or were able to give any testimony bearing upon the issues presented; and defendant also moves to tax the cost incurred by the summoning and examination of D. P. Upham to the plaintiff, because the testimony of the said witness was merely cumulative of that given by Louis Rau, and because said witness was brought from Fort Smith to this place at heavy expense to prove matters which could have been and were proven by other witnesses residing in Little Rock, to wit, Louis Rau and Arnold Syberg; wherefore, &c.

McCLURE AND B. C. BROWN,
For Defendant.

Filed November 18, 1876.

RALPH L. GOODRICH, *Clerk.*

And on November 20th, A. D. 1876, as follows:

UNITED STATES
v.
MERCHANTS' NATIONAL BANK OF LITTLE ROCK.

And now comes the United States, by P. C. Dooley, esq., acting district attorney, and by T. D. W. Yonley, esq., and the said defendant. The Merchants' National Bank of Little Rock, by John McClure and B. C. Brown, esqs., her attorneys, and the court being now well and sufficiently advised of the matters and things arising on the motion of said defendant for the taxation of costs in this case, it is ordered, considered, and adjudged that all the costs and fees of the officers of this court in this cause be taxed against and paid by the said defendant, and that the fees for attendance and mileage of the following-named witnesses, to wit, M. A. Cohn, Sam'l Wiggins, John Agery, Fred. Kramer, James R. Roland, Luper Robbins, Albert Cohen, Peter Hanger, Wm. J. Patton, J. R. Berry, R. R. Thornton, John D. Adams, Benton Turner, Geo. Wehr, J. H. Howe, H. T. Gibb, Geo. McLean, M. W. Benjamin, M. L. Rice, John W. Smith, Logan H. Roots, George R. Weeks, L. W. Coy, James L. Hodges, John M. Peck, John Brooker, Charles E. Withall, Isaack Huyck, R. G. Jennings, D. P. Upham, J. W. Ward, D. H. Barnes, Louis Rau, T. H. Jones, L. L. Thompson, P. C. Ewing, A. Syberg, Thomas Harding, and J. B. Chapline be taxed against and paid by said defendant, and that the fees of William P. Davison, stenographer in this cause, as the same shall be taxed and allowed, be taxed against and paid by said defendant, and that the fees of no other witnesses subpœnaed by the plaintiff in this cause be taxed against said defendant.

And on November 21st, A. D. 1876, as follows:

UNITED STATES
v.
MERCHANTS' NATIONAL BANK OF LITTLE ROCK.

Comes the defendant, by B. C. Brown, esq., her attorney, and files herein her motion in arrest of judgment.

Which motion is in the words and figures following, to wit:

The defendant comes and moves the court to arrest the judgment in this cause, and for cause therefor says:

I. That the act of Congress of , under which this action was brought, was not in force at the time this was brought, but had long before then been repealed by the Congress of the United States.

14 2. That the suit was for a tax alleged to be due from defendant, imposed for the paying out of the notes of the city of Little Rock, and that it was shown in the action and is the law of the State of Arkansas; that the said city was and is prohibited from issuing such notes, and that the notes which it is alleged the defendant paid out were notes issued by the officials of the said city without authority of law and were absolutely and ab initio void.

3. That the plaintiff could not by law impose a tax upon the bonds and evidences of debt of the said city of Little Rock or upon their circulation or use by the defendant.

4. That a tax imposed by the act in question was unlawfully and unconstitutionally imposed so far as the same affected or attempted to affect the circulation or use of the bonds and evidences of debt of the city of Little Rock, which at the time of the issue and of the use of the same by defendant was a municipal corporation of the State of Arkansas. And for other causes.

Wherefore, &c.

McCLURE AND B. C. BROWN,
For Defendant.

Filed November 21, 1876.

RALPH L. GOODRICH, *Clerk.*

And on December 19th, A. D. 1876, as follows:

UNITED STATES
v.
MERCHANTS' NATIONAL BANK OF LITTLE ROCK.

Comes the United States by T. D. W. Yonley, esq., her special counsel, and comes the defendant by John McClure and B. C. Brown, esqs., her attorneys, and the motion of the defendant in arrest of judgment heretofore filed herein is heard, argued, and submitted to the court, and the court, being well advised in the premises, considers that said motion be overruled.

And on December 22nd, A. D. 1876, as follows:

UNITED STATES
v.
MERCHANTS' NATIONAL BANK OF LITTLE ROCK.

Comes the defendant, by John McClure and B. C. Brown, esqs., her attorneys, and files herein her citation and also writ of error, which is signed by the court, and also her supersedeas bond, which is approved by the court.

Which bond is in the words and figures following, to wit:

Know all men by these presents that we, the Merchants' National Bank of Little Rock, Arkansas, Logan H. Roots and John D. Adams, are held and firmly bound unto the United States of America, in the just and full sum of five thousand dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and sever-

ally, by these presents, sealed with our seals and dated this 22nd day of December, in the year of our Lord one thousand eight hundred and seventy-six.

Whereas lately, a circuit court of the United States for the eastern district of Arkansas, in a suit depending in said court, between the United States, plaintiff, and the said Merchants' National Bank of Little Rock, defendant, judgment was rendered agains' the said Merchants' National Bank of Little Rock, and the said bank having obtained a writ of error to the Supreme Court of the United States and filed
15 a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now the condition of the above obligation is such, that if the said Merchants' National Bank of Little Rock shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and effect.

THE MERCHANTS' NATIONAL BANK OF LITTLE ROCK, ARKANSAS.

By LUCIEN W. COY,
Cashier.
JNO. D. ADAMS,
LOGAN H. ROOTS.

Witn'sses:
A. H. SEVIER.
FAY HEMPSTEAD.

The foregoing bond filed and approved as a supersedeas bond this 22nd day December, 1876.

HENRY C. CALDWELL,
U. S. Dist. Judge, East. Dist. Arks.

Filed Dec. 22, 1876.

RALPH L. GOODRICH, *Clerk.*

And which citation is in the words and figures following, to wit:

By the honorable Henry C. Caldwell, one of the judges of the circuit court of the United States for the eastern district of Arkansas, in the 8th circuit:

To the United States of America:

Whereas a writ of error hath lately issued out of the circuit court of the United States, a writ of error directed to the judges of the circuit court of the United States for the eastern district of Arkansas, stating that in the record and proceedings, as also in the rendition of the judgment of a plea in the said court before the judges thereof, between the United States, plaintiff, and the Merchants' National Bank of Little Rock, Arkansas, defendant, a manifest error hath happened, to the great damage of the said defendant; and whereas, for the correction of that error in due manner, the said writ has been issued, returnable at the next stated term of the Supreme Court of the United States, at the city of Washington, on the second Monday of October next: You are, therefore, hereby cited to appear before the said Supreme Court, at the city of Washington, on the said second Monday of October next,

to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Little Rock, in the eastern district of Arkansas, in the 8th circuit, the 22nd day of December, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the one hundred and first.

HENRY C. CALDWELL,
Judge U. S. for East. Dist. of Arkansas.

I hereby acknowledge and accept service on behalf of the United States of the within citation at the city of Little Rock, Arkansas, this 22nd day of December, A. D. 1876.

P. C. DOOLEY,
Acting U. S. Att'y East. Dist. Ark's.
T. D. W. YONLEY,
Special Att'y for U. S.

Filed Dec. 22, 1876.

RALPH L. GOODRICH, *Clerk.*

16 UNITED STATES OF AMERICA,
Eastern District of Arkansas:

I, Ralph L. Goodrich, clerk of the circuit court of the United States for the eastern district of Arkansas, eighth circuit, hereby certify that the foregoing writings annexed to this certificate are true, correct, and compared copies of the originals on file and remaining of record in my office.

In testimony whereof I have hereunto set my hand and the seal of this court this 25th day of January, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States of America the one hundred and first.

Attest:
[SEAL.] RALPH L. GOODRICH, *Clerk.*

17 In the Supreme court of the United States.

THE MERCHANTS' NATIONAL BANK OF LITTLE ROCK, Arkansas, pl'ff in error,
vs.
THE UNITED STATES, DEF'T IN ERROR.

The plaintiff in error assign' the following as error.

1. That the court erred in overruling the demurrer to the complaint.
2. That the court erred in sustaining the demurrer of plaintiff below to the 3rd paragraph of the answer.
3. That the court erred in overruling the motion in arrest of judgment.

Wherefore it prays that the judgment of the circuit court of the United States for the eastern district of Arkansas in the above-entitled cause be reversed.

JOHN McCLURE & B. C. BROWN,
For Pl'ff in Error.

(Endorsement on cover:) No. 218. The Merchants National Bank of Little Rock, plaintiff in error, vs. The United States. E. Arkansas C. C. U. S. Filed 4th October, 1877.

In the Supreme Court of the United States

Merchants Nat. Bank of Little Rock, Ark., — Plaintiff in Error.

vs.

The United States of America, — Defendant in Error.

Error from the Circuit Court for the Eastern District of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

IN THE SUPREME COURT OF THE UNITED STATES.

THE MERCHANTS NATIONAL BANK OF LITTLE ROCK, ARK., PLAINTIFF IN ERROR, VS. THE UNITED STATES, DEFENDANT IN ERROR.

Error from the Circuit Court for the Eastern District of Arkansas.

BRIEF FOR PLAINTIFF IN ERROR.

The demand made, against the plaintiff in error, is founded on the second section of an act entitled "An act to exempt wrapping paper, made from wood or corn-stalks, from internal tax, and other purposes." Approved March 26th, 1867, which section reads as follows:

"SEC. 2. That every National Banking association, State bank, or banker, or association, shall pay a tax of ten per cent., on the amount of notes of any town, city, or municipal corporation, paid out by them, after the first of May, A. D. 1867, to be collected in the mode and manner in which the tax on notes of State banks is collected."

15 *U. S. Stat. at Large*, 6.

For convenience, and to the end that the Court may fully understand the character of the paper described in the complaint, as "Notes of the City of Little Rock," we here insert copies thereof. One is called a "Little Rock City Bond," and is as follows:

LITTLE ROCK CITY BOND.

————years after date THE CITY OF LITTLE ROCK will pay to————, or bearer, TEN DOLLARS, with eight per cent. interest per annum at maturity. Little Rock, Ark., ————186—.

————,
Mayor.

————
City Clerk.

The other is called a "Little Rock Certificate of Indebtedness," and is in every respect, save the heading, similar to the "Little

Rock City Bond." Both are printed on bank note paper, and in some respects, have the general appearance of bank notes. These securities, when issued, were filled up with the *the name of the person to whom the city was making payment, and to whom it was indebted*, and was dated on the day it was issued, and payable from one to ten years after date.

By an ordinance of the city, also by an act of the Legislature, these evidences of debt are made receivable in payment of city taxes and all dues to the city.

The allegation of the complaint is, that the defendant paid out $1,600,000 of the notes of the City of Little Rock, and that the plaintiff is entitled to a tax of ten per centum on the amount so paid out.

To the complaint two grounds of demurrer were interposed, both of which were, in our opinion, erroneously overruled. The first is, that the complaint does not state facts sufficient to constitute a cause of action. The second is, that the Court has no jurisdiction.

The demurrer is founded on Section 3214 of U. S. Revised Statutes, which declares

"No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be *commenced*, unless the Commissioner of Internal Revenue *authorizes* or sanctions the proceedings."

The complaint nowhere discloses that the suit is "commenced" by the order, sanction, or authority of the Commissioner of Internal Revenue. The authority to sue should be alleged in the complaint first, because it is a material fact, and second, because the Court has no authority to entertain jurisdiction of such suits, unless the authority for the institution thereof, named in the law, is affirmatively shown. The averment of the authority to sue, by the District Attorney, is in the nature of a jurisdictional averment, and cannot be dispensed with.

The demurrer being overruled, the defendant answered:

First—That the defendant did not pay out $1,600,000 of the notes of the City of Little Rock, or any other amount which the plaintiff is entitled to a tax upon.

Second—That what the complaint describes as "*notes* of the City of Little Rock" were, in point of law and fact, "*bonds*" and "certificates of indebtedness" of said city, and not subject to taxation by the plaintiff, the same having been issued by the corporate authorities of said City of Little Rock, in the exercise only of functions strictly belonging to it, in its ordinary governmental and municipal capacity, as a means and instrumentality to aid said municipal cor-

poration to fully execute the powers and duties conferred and enjoined on it by law.

Third—That if what the City of Little Rock issued and called "bonds" and "certificates of indebtedness" are in fact "notes" of said city, that the same are not subject to taxation, by the plaintiff in error, said "notes" having been issued by said city in the exercise of functions strictly belonging to it in its ordinary governmental and municipal capacity as a means and instrumentality to aid said municipal corporation to fully execute the powers and duties conferred and enjoined on it by law.

The object of the first defense was to directly put in issue that allegation in the complaint which charged the appellant with paying out the notes of the City of Little Rock. The object of the second and third defenses was to directly raise the question whether the United States can legally impose and collect a tax upon the notes, bonds, or certificates of indebtedness of a city or municipal corporation, which represent only a just and valid debt, contracted before the issue of such note, bond, or certificate of indebtedness, and delivered to one of the creditors thereof in satisfaction and payment of a past due indebtedness.

To the second and third defenses there is a general demurrer. After the filing of the demurrer to the answer of the plaintiff in error, but before any determination was had thereon, an amended complaint was filed. To the amended complaint no plea or answer was filed, the amended complaint being treated as a substitute for the original.

The only difference between the original and amended complaint is this: the amended complaint contains the following words, which are not in the original, to-wit: "Said notes having been issued by said City of Little Rock *upon bank note paper*, in denominations of one, two, five, ten, twenty, fifty and one hundred dollars, payable to a person therein mentioned or bearer."

The cause was brought to trial on the issue made by the complaint, and the first ground of defense—which was, that the bank did not pay out the notes of the City of Little Rock.

The jury found for the defendant in error in the sum of $2,000 and judgment was entered accordingly. This cause comes here by writ of error, to test the correctness of the ruling of the Court in sustaining the demurrer to the second and third grounds of defense, which allege the act imposing this tax is unconstitutional.

It is conceded by the demurrer that the City of Little Rock is a

municipal corporation, and that it had the power to contract debts and give notes and certificates of indebtedness in evidence and in payment thereof; that all of the notes and certificates of indebtedness issued by said city, and alleged to have been paid out by the plaintiff in error, were time notes executed by order of the corporate authorities thereof, and used and appropriated in the building of schoolhouses; the support of schools; as a means of paying and extending the time of payment of the interest coupons of the bonded debt of said city; in paying and extending the time of payment of the maturing bonds of said city, and other obligations thereof, and as a means of paying for services and labor performed for said city; that no issue or payment of said notes was made by said city to any person or persons, except in payment of a just and valid debt, which had been duly allowed as such, *by the proper authorities of such city*, and that they were put in circulation by said city as a medium and means of enabling said municipality to execute its lawful powers; that said notes represented only an outstanding indebtedness which it had contracted in the exercise only of functions belonging to it as a municipal corporation at a time when its treasury was empty, and was issued for no other purpose or consideration whatever.

All this is conceded; but it was claimed in the Court below that notwithstanding this; that being issued in the similitude of bank notes, in sums of one, two, five, ten, twenty, fifty and one hundred dollars; that their *form and denomination* brought these notes within the mischief intended to be prevented by the second section of the act of March 26, 1867. It was contended in the Court below that the object of the second section of the act of March 26, 1867, was to suppress the circulation of the notes of cities and towns, and that Congress possesses this power. It was admitted in argument in the Court below, by the defendant in error, that the city had the right and power to issue notes on *white* paper, for any sum which might be due from it to its creditors, but asserted that the city, in the exercise of its borrowing powers, did not have the right the Federal government has, to make its notes of such *size, form* and *denomination* as to it might seem best. The whole theory of the defendant in error, in the Court below, was, that the right of the Federal government to tax the notes of a city, town, or municipal corporation, depended on the *color* of the *paper* and the *color* of the *ink* used in printing the same, and the *denomination* thereof. It was claimed that if the notes assumed such a character as to make them a convenient matter of exchange, or were of sufficient value

to answer the purpose of currency between citizens, then the paper was subject to taxation; otherwise it was not. All this is apparent from the amended complaint, which is a substantial copy of the original, except the amended complaint charges that the notes of the City of Little Rock were issued "upon bank note paper."

By reference to the act of March 26, 1867, it will be observed that Congress did not attempt to impose a tax upon the notes mentioned in the second section of the act, because they were issued *"on bank note paper,"* nor because they were issued in sums of one, two, five, ten, twenty, fifty and one hundred dollars; nor because they were in the similitude of bank notes; nor because the citizens in transactions between themselves used the same in lieu of currency. The tax, by the language of the act, is imposed upon the notes of towns and cities, if paid out, wholly irrespective of the kind of paper on which they were printed, the denomination thereof, or the object for which they were issued.

An attempt, no doubt, will be made to argue this case within the principle laid down in the case of the *Veazie Bank v. Fenno*, 8 *Wall.* 533. Feeling this to be true, we may as well establish the fact, at this point as any other, that that case has no bearing on the question now under consideration. First, let us look to the facts of that case. The reporter in stating them says:

"The *Veazie Bank* was a corporation, chartered by the State of Maine, with authority to issue notes *for circulation*, and the notes on which the tax imposed by the act was collected, were issued under this authority. There was nothing in the case showing that the bank sustained *any relation to the State* as a financial agent, or that its authority to issue notes was confined or exercised with any special reference to *other than private interests.*"

The Veazie Bank was a *private* corporation, which issued notes *for circulation*. The City of Little Rock is a *municipal* corporation that did not issue notes, *for circulation*, but only in the execution of its municipal functions. The Veazie Bank *"sustained no relation to the State,"* nor was its authority to issue notes confined or exercised with reference to "other than private interests." The City of Little Rock *sustains "a relation to the State,"* and its power to issue notes was conferred with reference *"to other than private interests."*

The distinctions between *private* corporations and *public*, or *municipal* corporations, is well known and need not be stated or discussed here.

There were but two questions raised or argued in the Veazie Bank case.

First—That the tax in question was *direct* tax and that it had not been apportioned among the States agreeably to the Constitution.

Second—That the act imposing the tax *impaired a franchise* granted by a State, and that Congress had no power to pass such an act.

In the case at bar we are not raising a question as to whether the tax imposed by the second section of the act of March, 1867, is a *direct tax* or whether it has been properly apportioned among the States agreeably to the constitution. Nor are we raising the question whether Congress has the power to pass an act "impairing a franchise granted by a State;" nor whether it has the power to tax the notes of a *private corporation* issued *for circulation* and so used. The question which we present is: "Can Congress tax the notes of a *municipal corporation* issued not as circulation, but *in the exercise of functions belonging to the municipality in its ordinary governmental capacity*, which corporation *is a means and instrument of State* and which *constitutes a portion of the sovereign power thereof?*"

With this question before us, let us now proceed with the examination of the Veazie Bank case. The act imposing the tax on the Veazie Bank reads as follows:

"That every National Banking association, State bank or State Banking association shall pay a tax of ten per centum on the amount of notes of any person, State bank or State Banking association *used for circulation* and paid out by them after the first day of August, 1866."

Chief Justice Chase in *Veazie Bank, vs. Fenno, 8 Wall., 533*, says:

"Congress may restrain, by suitable enactments, the circulation, *as money*, any notes *not issued under its own authority.* * * * The first step taken in this direction (that of restraining the circulation of paper money) was the act of July 17, 1862, prohibiting the issuing and circulation of notes under one dollar."

This language will no doubt be referred to, for the purpose of showing that the act of March 26, 1867, which imposed this tax was of a like character of that of July 17, 1862, and that the intention of the act imposing the tax on the notes of towns, cities and municipal corporations was to "*restrain the circulation*" of such notes as currency or money.

It must be borne in mind that the language of the Chief Justice was directed to a very different state of facts than the one before this Court. The notes he was speaking of were issued for no other purpose, and were designed for no other use, than circulation *as money*. The notes we are speaking of were not issued, or designed to circulate *as money*. In the one case the notes mentioned were bottomed *on credit*, and in the other they were *evidences of debt*.

In the one case the power of Congress in relation to *private corporations* is discussed and in the case at bar we are discussing whether Congress can tax the notes of a municipal corporation which were issued in payment of pre-existing debts, and not as money. It may be said that the *amount* of tax imposed upon the notes issued to circulate *as money* is evidence of an intent to restrain and prohibit the use of all notes not issued by the authority of Congress. That the act of March 26, 1867, was not so much designed "*to raise revenue*," as to assume the power to *regulate* a thing *by taxation*, under what, in the States, is called the *police power*.

Sedgwick, in his work on Statutory and Constitutional Law, (396) says a distinction exists between *taxation* and *regulation*. "The *distinction*," says Sedgwick, "between a demand for money, under the *police power*, and one made under the power to *tax*, is not so much one of *form* as of *substance*. The proceedings may be the same in the two cases, though *the purpose* is essentially different. The one is made for *regulation*, and the other for *revenue*. If the purpose is evident, in any particular instance, there can be no difficulty in classifying the case and referring it to the proper power."

States may levy taxes under two powers—that of *taxation* and under the *police* power. Not so, however, with the *United States*. In the case of the *United States vs. De Witt*, 9 *Wall.*, 43, it was held:

"That the United States do not possess any power of *police regulation*,—its sole power of regulation must be one which is used as a *means*, to *aid* in the *collection* of its *revenues*, and *cannot be exercised independent of this object*."

License Cases, 5 *How.*, 504.

Passenger Cases, 7 *How.*, 283.

License Tax Cases, 5 *Wall.*, 470.

Judge Miller, in *Peyton vs. Bliss*, 1 *Woolw.*, 170-3, in defining what a *revenue* act is, says:

"Any law which provides for the assessment and collection of a tax to defray the expenses of the government *is a revenue law*."

The tax imposed by the second section of the act of March 26, 1867, is to be collected by the ordinary revenue officers, and is paid into the treasury just as the ordinary revenue is.

There is an intimation in the *dictum* of the majority opinion, in the Veazie Bank case, that the tax imposed thereon might be sustained on the ground that the object was to protect and preserve the currency provided by congress. The intimation is gratuitous *dictum*. No such question was before the Court, and the whole

scope and tenor of the acts under which the notes of the United States were issued show conclusively that the object was to meet an emergency, and that they were not, originally, intended to become the *permanent currency of the country.*

Act of June 17, 1861, 12 *U. S. Stat. at Large*, 259.
" *February* 12, 1862, " " 338.
" " 25, 1862, " " 345.
" *July* 13, 1862, " " 532.
" *March* 3, 1863, " " 710.

The language of the Chief Justice should not be extended beyond the facts of the case to which it was applied, nor given greater significance than the occasion demands.

The question whether Congress had the power to restrain the issue and circulation of notes, as money, was not presented, or argued in the Veazie Bank case; nor was the law imposing the tax sustained on that ground.

There is a case, however, in which the question as to whether Congress had the power to restrain the circulation of notes as money, not issued under its own authority, was fully argued and determined by the Supreme Court of the United States. The opinion was delivered by Justice McLean, and speaking for the Court, he says:

"But the main grounds on which the counsel for the plaintiff rely is * * * that the Constitution intended to place the *regulation of the currency under the control of the Federal Government*, and that the act of Kentucky (in chartering a bank to issue notes to circulate as money) is not only in violation of the spirit of the Constitution, but repugnant to its letter. That by the Constitution the currency, *so far as it is composed of gold and silver*, is placed under the exclusive control of Congress, is clear, and it is contended, from the inhibition on the States to emit bills of credit, that the *paper* medium was intended to be made subject to the same power. If this argument be correct, then it must follow, as a necessary consequence, that all banks incorporated by a State are unconstitutional.

"This doctrine is startling, as it strikes a fatal blow against the State banks, which have a capital of nearly four hundred millions. But let us for a moment examine it dispassionately.

"The Federal Government is one of delegated powers. All power not delegated to it, or inhibited to the States, are reserved to the States or the people. A State cannot emit bills of credit, or in other words, cannot issue *that description of paper* to answer the purpose of money which was *denominated*, before the adoption of the Constitution, *bills of credit*. But a State may grant acts of incorporation for the attainment of those objects which are essential

to the interests of society. This power is incident to sovereignty, and there is *no limit* in the *Federal Constitution* in its exercise by the States, in respect to the incorporation of banks."

Briscoe vs. Bank of Commonwealth, 11 *Wheat.*, 316,

Here is a case where the Court was speaking directly of the notes of a bank which were designed to be used and circulated *as money*, and which differs from the Veazie Bank case in this, that it *"sustained a relation to the State"* much such as the Bank of the United States did to the Federal Government, and which was authorized to issue notes, not to subserve *private*, but *public* interests, and the Court held that the issue of such notes were not bills of credit, within the meaning of the Constitution, and that the State had an unquestioned right to issue them—in short, that it was an act and incident of sovereignty.

There is nothing in the Veazie Bank case, rightly understood, in conflict with this decision, or which goes to show that the Court intended to overrule the law as laid down in the case of *Briscoe vs. The Commonwealth Bank*, 11 *Wheat*, 257; but, on the contrary, the statement of facts in the Veazie Bank case precludes the idea that the Court ever intended to shake or doubt the correctness of the decision alluded to.

The City of Little Rock is just as much an instrument of the State of Arkansas as the Bank of the Commonwealth was of the State of Kentucky. The notes of the City of Little Rock are just as much a means of the State of Arkansas as were the notes of the Bank of the United States a means for executing the powers of the Federal Government. The rule which excludes the one from the interference of the States excludes the other from the taxing powers of the United States.

The power of Congress to establish a paper currency, *at all*, was before the Supreme Court of the United States in the *Legal Tender cases*, 12 *Wall.*, 457; and was sustained entirely on the ground that it was an appropriate execution of the *war power* of the Government, and not upon the power *to regulate the issue of notes to circulate as money.*

Chief-Justice Chase, in the Legal Tender case, abandoned the theory advanced by himself in the Veazie Bank case, and places the power of the Government to tax the circulation of notes issued by private corporations, to circulate, as money, on the ground that the existence of such notes might impede or retard the full exercise of the power to borrow money. It may be true that Congress, for the purpose of aiding the General Government in borrowing money,

has the right to tax the notes issued by *private* corporations out of existence. But this does not prove, nor does it follow that it has the power to levy a tax on the notes of a *municipal* corporation, which has the same power and the same right to contract debts, borrow money, and execute notes for the payment thereof, the General Government has, and which has the same right and power of prescribing the denomination of its notes, the form they shall assume, the rate of interest and time of payment, any other sovereign power has.

The respective powers of Federal and State taxation, and the boundary line thereof, is well settled.

Chief Justice Marshall, in *McCullough vs. Maryland*, 4 *Wheat.*, 428, undertook to state and define the powers of taxation of the States and the National Government. The definition there laid down has been followed for more than a half century; therefore we feel no hesitancy about its correctness. He says:

"If we measure the power of taxation residing in a State *by the extent of sovereignty* which the people of a single State *possess*, and can confer on the government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired, which leaves to a State the command of all its resources, and which places *beyond its reach* all those powers which are conferred *by the people of the United States on the Government of the Union*, and all those *means* which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty—from interfering powers—from a repugnancy between a right in one government, *to pull down* what there is an acknowledged right in another *to build up*—from the incompatibility of a right in one government to *destroy* what there is a right in another government to *preserve*.

"All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend, are, on the soundest principles, exempt from taxation. * * * That the power to tax involves the power to destroy—that the power to destroy may defeat and render useless the power to create—that there is a plain repugnance in conferring on one government a power to control the constitutional means of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied.

"If we apply the principle for which the State of Maryland contends, to the Constitution, generally, we shall find it capable of changing, totally, the character of that instrument. We shall find it capable of arresting all the measures of the Government, and of

prostrating it at the foot of the States. * * * If the State may tax one instrument employed by the Government in the execution of its powers, they may tax any and every other instrument.

"The Court has bestowed on this subject its most deliberate consideration. The result is, a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operation of constitutional laws, enacted by Congress, to carry into execution the powers vested in the General Government."

McCullough vs. Maryland, 4 *Wheat.*, 429 *to* 436.

The questions involved in the cases cited were fully argued eight years after the rendition of the opinion in McCullough vs. Maryland, and fully confirmed, in *Osborn vs. United States Bank*, 9 *Wheat.*, 735.

They were again argued in the case of *Weston v. City of Charleston*, 2 *Peters*, 464. The question was: "Is the *stock* issued for loans made to the Government of the United States liable to be taxed by State corporations?" and Chief Justice Marshall said:

"The stock it issues is the evidence of a debt created by the exercise of this power—the power to borrow money. The tax in question is a tax upon the *contract*, subsisting between the Government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates on the contract, the instant it is framed, and must imply a right to affect that contract."

"If the States and corporations throughout the Union possess the power *to tax a contract* for the loan of money, what shall arrest this principle in its operation and application to every other contract? * * * If the right to impose a tax exists, it is a right, which, in its nature, acknowledges no limit. It may be carried to any extent, within the jurisdiction of the State or corporation which imposes it. * * * We will not repeat the reasoning in *McCullough v. Maryland*, 4 *Wheat.* 400, but, that conclusion was, that all subjects over which the sovereign power of a State extends, are objects of taxation, but those over which it does not extend are, on the soundest principles, exempt from taxation. The sovereign authority of a State extends to everything *which exists by its own authority*, or is introduced by *its* permission; but not to those means employed by the congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the power of taxation, on the *means employed* by the government, is, in itself, an abuse, because it is the usurpation of a power which the people of a single State cannot give. The States have no power, by taxation, or otherwise, to retard, impede, hinder, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Covernment.

"The American people have conferred the power of borrowing money on their Government, and, by making that Government

supreme, have shielded its action in the exercise of this power from the action of local governments. * * * The right to tax the contract, *to any extent*, when made, must operate on the power to borrow, before it is exercised, and have a sensible influence on the contract. The extent of the influence depends on the will of a distinct government. To any extent, however inconsiderable, *it is a burden on the operations of the Government*, and it may be carried to an extent which shall arrest them entirely.

"The tax on government stock, is a tax *on the contract*, a tax on the power to borrow money, on the credit of the United States, and therefore repugnant to the Constitution of the United States."

Weston vs. City of Charleston, 2 *Peters*, 464.

In *Bank of Commerce vs. New York City*, 2 *Black.*, 628, the question was, whether or not the stock of the United States, *in the hands of third parties*, was subject to taxation. After reviewing and affirming the cases of *McCullough vs Maryland*, and *Osborn vs. United States Bank*, the Court said:

"The doctrine maintained in those cases is, that the powers granted by the people of the States, to the General Government, and embodied in the Constitution, are supreme within their scope and operation, and that this Government may exercise these powers in its appropriate departments, free and unobstructed by any State legislation or authority. That within this limit this Government —the United States—is sovereign and independent, and any interference by the State Governments tending to the interruption of the full, legitimate exercise of the powers thus granted, is in conflict with that clause of the Constitution which makes the Constitution and laws of the United States, passed in pursuance thereof, the supreme law of the land. * * * The power to borrow money on the credit of the United States is admitted. It is one of the most important and vital functions of the General Government, and its exercise a means of supplying the necessary resources to meet exigencies in times of peace or war. But of what avail is the functions, or the means, if another Government may tax it at discretion? * * *

"All will agree that this is the enunciation of a true principle, and it is only by a wise and forbearing application of it that the operation of the powers and functions of the two Governments can be harmonized. * * * Each is sovereign and independent in its sphere of action and exempt from the interference of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit, on both sides, a conflict of authority need not occur or be feared."

In Bank of New York vs. Supervisors, 7 *Wall.*, 26, the question was, whether the notes issued under the Currency and Loan acts of 1862, could be taxed by State authority, in the hands of third parties. The Court said:

"It is clear these notes were intended to circulate *as money*, and with the National Bank notes, to constitute the credit currency of

the country. Nor is it easy to see that the taxation of these notes *used as money*, and held by individual owners, can control or embarrass the power of the Government in issuing them for circulation, more than like taxation embarrasses its power in coining and issuing gold and silver money for circulation. * * But, on the other hand, it is equally clear these notes are *obligations* of the United States. Their name imports obligation. Every one of them expresses on its face an engagement of the nation to pay a certain sum. The dollar note is an engagement to pay a dollar, and the dollar intended is the coined dollar of the United States. * * * They are strictly *securities*. They secure the payment stipulated to the holders by the pledge of the national faith, the only ultimate security of all national obligations, whatever form they may assume."

Weston vs. City of Charleston, 2 *Peters*, 449.

In *Dobbins vs. Erie Co.*, 16 *Peters*, 444, the question was, whether an officer of the United States could be taxed on his salary by State authority. The Court said:

"The only difficulty in the act has arisen from the terms directing assessments to be made upon all officers and posts of profit, without restricting the assessment to offices and posts of profit, *held under the sovereignty of the State*, and not *excluding* them from being made upon the offices and posts of profit *of another sovereignty*—the United States. * * * Taxation is a sacred right, essential to the existence of government. But in our system there are limitations upon that right. There is a concurrent right of legislation in the States and the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject, by express prohibition in the Constitution. And the *States*, are by such as are necessarily implied, when the *exercise of the right*, by a State, conflicts with the perfect execution of *another sovereign power*. That occurs when, by taxation, a State acts upon the *instruments, emoluments and persons* which the United States may use and employ as necessary and proper means to execute their sovereign powers. The Government of the United States is supreme within its sphere of action. The means necessary and proper to carry into effect the powers in the Constitution, are in Congress. The execution of a National power, by way of compensation to officers, can, in no way, be *subordinate to the action of the State legislatures*. To allow such a right of taxation to be in the States, would, in effect, be to give the States a revenue out of the revenue of the United States, which they are not constitutionally entitled to, either directly or indirectly—neither by their own action *nor by that of Congress*.

In *Buffington vs. Day*, 11 *Wall.*, 113, the question was, whether Congress could impose a tax upon the salary of a judicial officer of a State, which is the reverse of the question presented in *Dobbins vs. Erie Co.* The Court said:

"The judicial officers appointed under the authority of a State being a *means* and *instrumentality* to carry it—the State laws—into

execution, the right and necessity of its unimpaired exercise, and the exemption of the officer from taxation, by the Government (Federal), stand upon as solid ground, and maintained by principles and reasons as cogent as those which led to the exemption of the Federal officer, in *Dobbins vs Erie County*, from taxation by the State; for in this respect—that is, in respect to the reserved power of the State—*the State is as sovereign and independent as the General Government.* And if the *means* and *instrumentalities* employed by that government—the United States—to carry into operation the powers granted to it, are, necessarily, and for the sake of self-preservation, *exempt from taxation by the States*, why are not *those of the States*, depending on *their reserved powers*, for like reasons equally exempt *from Federal taxation?* Their unimpaired existence in the one case is as necessary as in the other.

"It is admitted that there is no express provision in the Constitution that prohibits the General Government from taxing the means and instrumentalities of the States; nor is there any prohibiting the States from taxing the means and instrumentalities of the General Government. In both cases the exemption rests on *necessary implication*, and is upheld by the great law of self-preservation; as any government, whose means employed, in the conducting its operations, if subject to the control of another distinct government, can exist only at the mercy of that government, of what avail are these means if another government may tax them at discretion?

"The Constitution guarantees to the State a republican form of government, and protects each against invasion and domestic violence. * * * . It would seem to follow, as reasonable, if not a necessary consequence, that the *means* and *instrumentalities* employed for carrying on the operations of their governments, for preserving their existence and fulfilling their high and responsible duties assigned to them, in the Constitution, should be left free and unimpaired—should not be crippled, much less defeated, by the taxing power of another Government, which acknowledges no limits but the will of the Legislature imposing the tax."

In the case of *M. Cullough vs. Maryland*, 4 *Wheat.*, 400, the question was, whether the State of Maryland could impose a stamp tax upon the notes of the Bank of the United States, used as currency within that State. The decision, in effect, is, that inasmuch as the Bank was, to some extent, a fiscal or financial agent of the United States, that it was a *means* and *instrumentality* created and employed by Congress, and therefore exempt from the interference of the States.

In the case of *Osborn vs. United States Bank*, 9 *Wheat.*, 738, the State of Ohio undertook to impose a tax of $50,000 per annum on each office of discount and deposit which the United States Bank had within the State. Mr. Clay, in argument, characterizes the act as intended to *expel* the branches of the United States Bank from

the State, and as inflicting penalties amounting to a prohibition of the branch banks to exercise their rights and powers. The decision, in effect, is, that the power exercised by the State of Ohio was not directed to an object of taxation *which existed by the permission or authority of the State*, but to an object which existed *under the Constitution and Laws of the United States*, and being a *means* for the execution of a lawful power, could not be interfered with by the State.

In the case of the *National Bank vs. Kentucky*, 9 *Wall.*, 353, the State of Kentucky undertook to impose a tax on the shares of stock of a National Bank. The Court said:

"The principle we are discussing has its limitation. That limitation is, that the agencies of the Federal Government are only exempted from taxation by State legislation, so far as that legislation may interfere with, or impair, their efficiency in performing the functions by which they are designed to serve that government."

In *Sayles vs. Davis*, 22 *Wis.*, 229, the question was whether the Congress of the United States could lawfully impose a stamp tax, on a tax deed to be executed under State authority. The Court said:

"As to the omission to fix an internal revenue stamp to the tax deed, under which the plaintiff claims, we think such stamp was unnecessary. We are of opinion that Congress possesses no constitutional power to tax the *means* and *instruments* devised *by the States* for the collection of their own revenues."

In *Jones et al. vs. Keep*, 19 *Wis.*, 369, the question was, whether Congress could require stamps to be affixed to "writs or other original process by which any suit is commenced in a Court of Record." The Court said:

"An assertion of power *on the part of the States*, which, in its exercise, necessarily impedes or hinders the General Government in its constitutional action, is unwarranted. And, for a like reason, an assertion of power, on the part of the *General Government*, which, in its exercise, necessarily impedes and hinders the operation of the *State Governments*, while acting within the scope of their powers, is wholly unauthorized. From this, it follows, there must be some limit to the taxing power, on the part of the States and that of the General Government. Such limitations must necessarily exist, for an unlimited power to tax, on the part of one, is incompatible with the existence of the other. For if an unlimited power of taxation, on the part of Congress be established—if it may require the writ of a State to be stamped—it may likewise say, that an act of the Legislature, a commission, or pardon issued by the Governor, shall have no effect unless stamped."

In *Warren v. Paul*, 22 *Ind.*, 276, the question was, whether Congress could require the writs of State Courts to be stamped. The Court said:

"There must be some limit to the power of Congress to lay stamp taxes. Suppose a State to form a new, or to amend her existing Constitution, could Congress declare it to be void unless stamped with a Federal stamp? Can Congress require the State legislatures to stamp their bills, journals, laws, etc., in order that they shall be valid? Can it require the executive to stamp all commissions? Can Congress thus subjugate a State by legislation? We think this will scarcely be pretended. * * * Can Congress regulate or prescribe the taxation of costs in a State Court? The Federal Government may tax the Governor of a State and his transactions, *as a citizen*, but not *as a State officer*. This must be so, or the State may be annihilated at the pleasure of the Federal Government. The Federal Government may, perhaps, take, by taxation, most of the *property* in a State, if exigencies require, but it has not a right by direct or indirect means, to annihilate the *functions* of the State Government.

"As a result necessary to harmony of operation between the Federal and State Governments, it follows that the Federal Government must be limited in its right to lay and collect stamp taxes to the citizens and their transactions as such, or as acting in the Federal Government, officially, or otherwise, and cannot be laid upon and collected from individuals on their proceedings when acting, not as citizens, transacting business with each other as such, but officially, or in the pursuit of rights and duties in and through State official agencies and institutions. When thus acting, men are not acting under the jurisdiction, nor within the power of the United States—not acting as subjects of that government—not acting within its sphere of power, over them. and neither they, nor their proceedings, are subject to interference from the United States."

To the same effect are the following cases."

Union Bank v. Hill, 3 *Cold.*, 325.

Smith v. Short, 40 *Ala.*, 386 to 391.

Fifield v. Close, 15 *Mich.*, 505 to 510.

Walton v. Brienth, 24 *How.*, (*N. Y.*) 357.

In *United States vs. Railroad Company*, 17 *Wall.*, 327, the question was, whether *Congress* could impose a tax upon the *revenues* of a municipal corporation. The Court said:

"The power of taxation, by the Federal Government, upon subjects, and in the manner prescribed by the act we are considering, is undoubted. There are, however, certain departments which are *excepted* from the general power. The right of the States to administer their own affairs, through their legislative, executive and judicial departments, in their own manner, is conceded by uniform decisions of this Court and by the practice of the Federal Government from its organization. This carries with it an *exemption* of those agencies and instruments *from the taxing power of the Federal Government*. If they may tax lightly, they may tax heavily—if

justly, oppressively. Their operations may be impeded and destroyed, if any interference is permitted. Hence, the beginning of taxation is not allowed on one side—is not claimed on the other."

In the above case, Justices Clifford and Miller dissented. But upon the question of taxing a municipal corporation, both say:

"The means and instrumentalities for conducting the public affairs of the municipality are entitled to the *same exemption* from taxation *as the revenues of a State.*"

The dissent is based on the ground that the bonds sought to be taxed were held as *private*, and not as *municipal* property.

From these decisions we glean certain facts in relation to what is meant by retarding, impeding, burthening and controlling the operations of another government. The examination discloses that an attempt to tax the bonds, notes, securities, or evidences or debt of the United States, by State, county or municipal authority, is denied; that the taxation of a bank which the Government ment uses in the transaction of its business, and which was created to aid in the transaction of its monetary matters, is not the subject of taxation or police regulation; that the salary of the State and Federal officers are exempt from taxation by another sovereignty; that the revenues of a city cannot be taxed by the Federal Government; that the United States cannot require a State to stamp its deeds, and that it cannot require suitors to stamp the writs and processes issued out of the State Courts.

If it be true, as laid down in *Weston vs. City of Charleston*, 2 *Peters*, 464, that the right to tax the contract, *to any extent*, operates on the power to borrow, and has a sensible influence on the contract which cannot be tolerated by the Federal Government, when claimed by the States; and if it be true that such taxation is a "burden on the operation of the Federal Government," why is it that the imposition of a tax on the notes of the City of Little Rock, by the Federal Government, is not equally a burden on the operations of a government which the State has conferred the power of borrowing money upon?

If it be true that the power of taxation is to be measured by the "extent of sovereignty" which the people of that sovereignty may confer, and that such a rule leaves the State to the command of all its resources, and places it beyond the reach of taxation by the Federal Government, it necessarily follows that these notes cannot be taxed, directly or indirectly, by the defendant in error. That the City of Little Rock is a municipal corporation, created by the authority of the State of Arkansas as a means of promoting the

welfare of its citizens, is not denied. It is a corporation which the sovereignty of the State had the right to create, and one which the Federal Government has no power to destroy, impede or retard the operations of.

If it be true that "the sovereign authority of the State extends to everything which exists by its own authority," and that things which exist by the authority of the State, alone, are not the subject of taxation by the Federal Government, on what grounds can this judgment be sustained? If the City of Charleston has not the right to tax the stocks of the United States, where does the United States get the right to tax the stocks of the City of Little Rock? If the State of Maryland could not impose a stamp tax on the notes of the United States Bank, because the bank did not exist by the authority of the State, but under the authority of the United States, where does the United States get the right to tax the notes of one of the municipal corporations of a State? If the State of Ohio did not have the power to impose a tax upon the branch banks of the United States, located in that State, for the reason that the bank did not derive its authority from the State, and was a means and instrumentality of the Federal Government, where does the United States get the power to impose a tax upon the means and instrumentalities of a State government? If the States have no power, by taxation, to retard, impede, or burden, the borrowing power of the Federal Government, where does the Federal Government get the power to retard, impede, or burden by taxation, the borrowing power of a municipal corporation, which a State has conferred upon it? If a tax on Government stocks is a tax "on the contract—a tax on the power to borrow money—a tax on the credit of the United States," as was held in *Weston vs. City of Charleston*, 2 *Peters*, 464, why is it that a tax on the notes of the City of Little Rock, is not equally a tax on the power of the city to borrow money? Why is it that it is not a tax on the contract? Why is it that it is not a tax on the credit of the City of Little Rock? If it be true, as laid down in the *Bank of Commerce vs. New York City*, 2 *Black*, 628, that the Federal Government and the State Government are each sovereign and independent of the other, in their respective spheres of action, and exempt from interference by the other, in the means employed, or the functions exercised, how can this demand be maintained? If it be true, as laid down in *Bank of New York vs. Supervisors*, 7 *Wall.*, 26, that the notes issued by the United States under the Currency and Loan Acts are not taxable, by State authority in the hands of third parties, why is it that the notes of the City of Little Rock are

taxable? Will it be claimed that the United States can exalt its borrowing power at the expense of the States? Will it be claimed that the Congress of the United States under the pretense of borrowing money has the right to retard, impede and hinder the exercise of the borrowing power of the States, or the municipal corporations of their creation?

But it may be said the act under consideration does not necessarily impose a TAX on the credit of the city, or its securities; but that the tax is imposed upon those, only, who pay the same out. Suppose the Legislatures of the different States of the Union should pass acts imposing a tax of ten per cent. on the amount of notes issued under the authority of the United States, paid out by any person or corporation within the States, would not such an act tend to "retard, impede and burden" the operations of the Federal Government? Would it not be claimed that this was the throwing of an impediment in the way of the exercise of the borrowing power of the Government? If such an act could be enforced against the United States, what would its securities be worth? The Government of the United States has, by the act of March 26, 1867, under which this suit is instituted, designated the public depositories of money, in each locality, by name, to-wit: National Banking Associations, State Banks, Bankers, and Banking Associations, and declare that none of these institutions, or persons, shall pay out the notes of any city, town, or municipal corporation, unless they pay the United States a tax of ten per cent. thereon. Does not legislation, of this character, have a sensible influence on the contract? The plaintiff in error, was in the habit of selling these notes at ninety-nine cents on the dollar, and the court below held that a *sale* of these notes, by the bank in this manner, was, in effect, a "paying out," and it was upon this instruction the judgment in this case was obtained. Under the act, the tax is imposed if the notes are "paid out." Of what value or utility would a note of the United States be if the party holding it has to pay a tax of ten per cent. on its face value, every time he "pays it out"? The power to borrow money is certainly circumscribed and narrowed, whenever a tax is imposed on persons and corporations, whose principal business is to deal in public securities. The permission to be a banker or a broker, or to do a banking business, except as to National Banks, is a privilege granted and regulated by the State. Can it be said that an act which inhibited those brokers and bankers and banking institutions, whose powers are derived *solely from the State*, from paying out "legal tender notes," would not render the notes of the United States less valu-

able? Would it not destroy their use, and affect the credit of the Federal government? Can it be said that an act of Congress, which, in effect, forbids the monied institutions and persons of the country from buying and selling the notes of cities, towns and municipal corporations, does not affect the value thereof and render them less valuable? It may be said that this is a tax which is only imposed on the happening of a contingency. Our response is, that while the imposition of the ten per cent savors more of a *penalty* than a *tax*, the observance and enforcement of the law restricts, impedes and retards the cities and towns in the use of exercising their borrowing powers. The effect of the law is, even if the tax is avoided, to not only prevent the investment of money in such securities, but to prevent a transfer of the same.

It may be said that one object of the law was, in effect, to inhibit cities and towns from issuing notes, and thus give the Federal Government an advantage over these municipalities in the use of its borrowing power. The Federal Government has no control or power over cities and towns. Such organizations do not exist by permission of the Federal Government, nor do they constitute any portion of its sovereignty, nor has the Federal Government the constitutional power, by legislation, to exalt its own securities to the detriment of another sovereignty, as it is claimed it has attempted to do by the act of March 26, 1867.

The exemption of the notes and bonds of the United States from taxation is based *not* upon the theory that the *government* is taxed, but upon the ground that the taxation, if tolerated, would render the securities less valuable and less desirable as investments. Can it be said that the notes of the City of Little Rock are as valuable or desirable as investments, if the United States imposes a tax upon every person who pays them out? It may be said the tax is not imposed on every person, that it only extends to National Banks, State Banks, Bankers and Banking associations. The answer is, that *the acknowledgement of the power to designate these persons and corporations constituting, as they do, the money depositories of the country, carries with it the power to include persons of every other vocation in life, and thus absolutely prevent States, counties, cities and towns from a full exercise of their borrowing powers.*

In the *Bank of Commerce vs. New York City*, the Court said: "Each—the United States and the States—is sovereign and independent in its sphere of action and exempt from the interference of the other, both in the means employed and the functions exercised." In *Buffington vs. Day* it said: "The means and instru-

ments employed for carrying on the operations of the government should be left free and unimpaired—should not be crippled, much less defeated—by the taxing power of another government." Can it be said the notes of the City of Little Rock are exempt from Federal interference if that Government retards their use by imposing restrictions on their transfer? Can it be said that the operations of a State or municipal Government is not crippled when the taxing power of another government collects a revenue from the evidences of debt of the other? Will any man say that such legislation as is directed to the evidences of debt of towns and cities by the Federal Government, would be tolerated by it from the other? Where is the independence of these sovereign powers, of which the Supreme Court speaks, if the one may tax the other's securities in the hands of any one? Is this leaving the powers of the municipality free and unimpaired?

It may be argued that the National Banks are creatures of the General Government, and that it has the right to impose such terms, conditions and restrictions upon the bank as it pleases. Such is not the object of this act. The act was not passed to regulate or restrict the National Banks. It is aimed at all Banks and Bankers. The intent of Congress was, to inhibit the Banks and Bankers from dealing in such securities, and it is not at all probable it would have been passed had it been confined to National Banks alone. That Congress has the power to prohibit National Banks from dealing in other than legal tender and National Bank notes, may be true; but the statute now under consideration is not of this character, and was not enacted for any such purpose. It is aimed, not at a protection of the National Bank circulation, but at the notes of the cities and towns over which Congress has no control. An intent is patent, on the face of the act, to render the use and transfer of the notes of cities and towns impracticable, and to affect their use and value. The act is to be judged from its intent. There is no fine, penalty or forfeiture imposed for paying these notes out. The law says a *tax* of ten per cent. shall be paid, if it be done. This *tax* cannot be regarded as a fine, penalty or forfeiture, for these can only be enforced in the Courts, while the *tax* is to be collected in the same manner and by the same officer that the general revenue is.

The position which we take is, that Congress can neither create agencies to tax State, county or municipal securities, or place a tax on bankers, brokers or banking associations, for dealing in municipal securities, who are creatures of the State, who only act as such

by leave of the State, without retarding, embarrassing and impeding the operations of a government over which it has no control. That Congress could not compel those notes to be stamped we think will be admitted; if it cannot, why is it that upon the happening of a contingency, it may collect a tax of ten per cent. on the amount of bonds or notes sold by a bank?

It may inhibit its own creatures from the performance of any specified act, which does not hinder, retard or embarrass the action of another sovereignty, but this must be done by ~~plenary~~ legislation, and not by virtue of, or under the pretence of, *raising revenue*. The act under consideration must stand or fall, not as an act imposing *penalties* upon a creature of the Federal Government, (for the act extends beyond this, and to creatures of the State), but must be examined to ascertain whether, in doing so, Congress, in its search after objects of taxation, and in its desire to give currency to, and create a demand for the notes of the Federal Government, has not trespassed upon the rights of the States and restricted the free and full exercise of the borrowing power of sovereignties, over which it had no control. Suppose a State should make it a penal offense for one of its citizens to sell a bond of the United States? It will be admitted that the State has a right to declare what acts shall constitute a penal offense; now will it be claimed that such legislation would not have a tendency to affect the value of the securities of the Federal Government? Suppose a State should declare that each of its citizens who sold and delivered a bond of the United States within the State, or elsewhere, should pay a tax of ten per cent. on each and every of such sales, will it be claimed that such legislation would not have a tendency to affect the value of the securities of the Federal Government? In what does legislation of this character differ from the attempt made in Ohio, in the case of *Osborn vs. U. S. Bank*, to *expel* the offices of the Bank from the State? Wherein does it differ from the act of March 26, 1867? Congress, ordinarily, has the right to inhibit banks of its own creation from the performance of specific acts, but to this general rule there is this exception: that in doing so it must take care that it does not hinder, retard or impede the free use and the full exercise of the powers belonging to the States.

JOHN McCLURE,
For Plaintiff in Error.

In the Supreme Court of the United States.

THE MERCHANTS NATIONAL BANK OF LITTLE ROCK, ARK., PLAINTIFF IN ERROR, VS. THE UNITED STATES, DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

The United States sued in the Court below to recover a tax of ten per centum upon the amount of the notes of the City of Little Rock, paid out by the plaintiff in error, which tax was imposed by the act of March 26, 1867.

15 *Stat. at Large*, 6.

The defendant, (third paragraph of answer), answered that the City of Little Rock, during all the time from the passage of the act until the filing of the answer, was a municipal corporation of the State of Arkansas, duly chartered by, and organized under the laws of that State, and with power to contract debts, borrow money, and do all other necessary acts for discharge of the governmental and other duties imposed upon it by the act creating it; that the notes of said city paid out by defendant, were the certificates of indebtedness and bonds of the city, issued by it to enable it to anticipate its revenues, and to borrow money for its use, and that they were a means devised and used by the city to enable it the better to exercise its powers and discharge its duties.

To this part of the answer a demurrer, interposed by the Government, was sustained.

After trial and verdict for plaintiff, defendant below moved, in arrest of judgment, alleging for cause the error of the Court in sustaining the demurrer, and farther, that the act of Congress under which the action was brought, so far as it imposed a tax upon the use of the notes of a State municipal corporation, was unconstitutional and invalid.

The motion was overruled, judgment given for plaintiff below, and defendant brings error, assigning the grounds—

First—The Court erred in sustaining the demurrer of the appellee to the third paragraph of the answer.

Second—That the Court erred in overruling the motion in arrest of judgment.

Third—That the judgment should have been for defendant, instead of for plaintiff.

The powers and duties of the Corporation of the City of Little Rock are defined by public law, and it is within the judicial knowledge of the Court that the city possessed all the powers claimed in the answer. For this reason, and also because the allegations of the answer were admitted by the demurrer, it is unnecessary to copy the provisions of the act of incorporation.

Plaintiff in error contends that, so far as it seeks to impose a tax by the Government of the United States, upon the circulation or other use of the notes of a State municipal corporation, the act of Congress of March 26, 1867, is unconstitutional and invalid. And this is the only question presented on error.

The principle to which we appeal is well settled.

In our dual Government, each—State and Federal—is supreme in its own sphere. Each, in all its departments, may devise and use its own means for the discharge of its duties and exercise of its powers, without hindrance from the other. Neither may, directly nor indirectly, by taxation or otherwise, impede the other in the use of such means.

McCullough vs. The State of Maryland, 4 *Wheat.*, 415.
Weston vs. Charleston, 2 *Peters*, 449.
Dobbins vs. Commissioners of Erie County, 16 *Peters*, 483.
Bank of Commerce vs. New York City, 2 *Wall.*, 620.
Bank Tax Cases, *Id.*, 200.
Bradley vs. The People, 4 *Id.*, 49.
Banks vs. The Mayor, 7 *Id.*, 49.
Bank vs. Supervisors, *Id.*, 26.
United States vs. Railroad Company, 17 *Id.*, 327.
Collector vs. Day, 11 *Id.*, 113.
Freedman vs. Sigel, 10 *Blatch.*, 327.
State vs Garton, 32 *Ind.*, 1.
Jones vs. Keep, 19 *Wis.*, 369.
Fifield vs. Close, 15 *Mich.*, 505.
Sayles vs. Davis, 22 *Wis.*, 229.
In the Matter of Georgia, 12, *Op. Attorney General*, 282.

A State municipal corporation is a part of the State Government, and the principle cited protects such corporation from Federal taxation to the same extent, and in the same manner, as it protects the State itself.

United States vs. Railroad Company, 17 *Wall.*, 327.

Neither a validity nor the existence of the principle can or will be denied, but it will be contended that it does not shelter defendant from payment of the tax.

That the tax is a tax upon the notes and evidences of indebtedness of the municipality, or rather upon the corporation itself, cannot be denied. In determining whether a tax falls within the prohibition of the principle cited as being a tax upon the means used by the co-government for the discharge of its governmental duties, its effect must be considered, and is decisive. In the words of this Court, in *Railroad Company vs. Peniston*, 18 *Wall.*, 36, the question depends "upon the effect of the tax. That is upon the question whether the tax does, in truth, deprive them," the agents or means, "of the power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power."

The effect of the tax in this case needs no illustration or elucidation. It is at once apparent as the most burdensome tax which has ever come before this Court for determination. In all former cases, the tax was a single specific one, ending on payment. This is a continuing tax, following the City's note wherever it may go, which never ends or ceases *until the City abandons the attempt to exercise its legitimate powers.* In ten transfers the National Government *absorbs the whole value of all the notes issued by the City.* Each taker from the City must consider not only the tax which he himself must pay, but also that which must be paid by the person who takes it from him, for each transfer, whether in exchange for the obligations of the Government, or for private persons, whether for articles purchased or in payment of debts, whether at a discount or premium, or at par, is a "pay out," within the meaning of the act imposing this tax.

The case most nearly analogous to this is *Weston vs. Charleston*, 2 *Peters*, 449. The "stock" of the United States in that case and the "notes" of the City in this are similar in every respect. Each was the evidence of a governmental debt, contracted in the exercise of the borrowing power. With mere substitution of names, the case is, in whole and in part, an argument for us. It is useless to follow out the analogy, for it is apparent upon the most cursory reading. The argument which in that case demonstrated that a tax

upon the Government stock was a tax upon the borrowing power of the Government, and upon the Government itself, equally demonstrates that a tax in this case was a tax upon the borrowing power of the City, and a tax upon the corporation itself. It is a mistake to call this a tax upon the bank. The bank may be the paying agent, just as in *The United States vs. The Railroad Company*, 17 *Wall.*, 327. The Railroad Company was the paying agent, but, as in that case, the tax, when paid, fell upon the City of Baltimore, so, in this case, it falls upon the City of Little Rock. The only material difference which exists between *Weston vs. Charleston* and the case at bar is, that in *Weston vs. Charleston* the tax was imposed directly upon the stock, while here, the attempt is to arrest the paper in its circulation, to prevent its passing from hand to hand, by affixing a tax upon its transfer. And it is contended that this is not a tax upon the paper of the municipality. This is to argue that the National Government may do indirectly what it cannot do directly. The argument has been met and answered by this Court in more cases than one. In *Weston vs. Charleston* it was admitted that the power of the Government to borrow money could not be directly opposed, but a distinction was taken, in argument, between direct opposition and those measures which consequently effected it, which distinction was promptly repudiated by the Court.

The New York Bank cases are instances of attempts of the same kind, that State having changed its mode of taxation as often as a precedent one was condemned until convinced, by repeated adjudications, that it could not accomplish its end, however indirectly it made its approach.

If this is a tax which affects the notes of the municipality, directly or indirectly, it must be condemned; and that it is such there can be no doubt. For it is the quality of transfer—of passing from hand to hand, which gives to the notes or evidences of debt of any government—from that of the United States down to that of the smallest municipality, its chiefest value. Take from the national currency this quality, and its value would be greatly impaired if not absolutely destroyed. To say that Congress may not tax the paper, and yet may destroy the quality which gives the paper value, is an evasion unworthy of a government, great or small.

Besides this, the distinction would be a dangerous one. As to the power of taxation, the rights and regulations of the National and State governments are strictly correlative. Each, as to the

other, possesses the same rights and is bound by the same restraints. If, without the power to tax the notes of the city, Congress may arrest them in their circulation and impose a tax upon the act of paying them out, *the States may, with the same right, impose a tax upon the act of paying out the National currency, or upon the transfer of National obligations.* If the power exists upon one side, it does upon the other, and the States may destroy to the National Government the value of its notes or other obligations, just as the United States, in this case, destroyed the value of its notes to the City of Little Rock.

Besides the argument drawn from the manner of imposition of the tax, we have heard but one other urged against us.

It is said that the National Banks are the creatures of Congress, and that Congress could impose upon them any prohibition, or grant to them any privilege—could enforce the prohibition by any penalty, or affix to the exercise of the privilege any price; that the plaintiff in error, having violated the prohibition, must pay the penalty; or, having exercised the privilege, must pay the price. We may admit the power claimed for Congress, that it could have prohibited National Banks from dealing in the notes of cities, but the admission does not affect our case, for the reason that *Congress neither imposed a prohibition upon, nor granted privilege to, National Banks, in regard to the matter in question.* What it might have done, or could have done, is not for our consideration. The question is, what was done?

It seems clear that the argument of prohibition or privilege gains nothing from the fact that the plaintiff in error is a National Banking association, deriving its powers from the act of Congress. While such associations are named in the imposition of the tax, it is not imposed upon them as a distinct class. The tax was imposed upon "every National Banking Association, State Bank, Banker, or Association," thus showing that the mind of the Congress was not directed to dealings by National Banks alone, but was employed in an effort to suppress the circulation and transfer of the notes of municipal corporations. If that effort cannot be sustained as to the other corporations and persons named, it must fail as to all—National Banks included. The attempt to imply a prohibition or a privilege to the National Bank, because of the character of its creation, requires us to give to words in the same sentence different significations as applied to the different persons enumerated.

Penalties are never implied. They must be directly affixed as penalties by clear words, for courts will never find them by impli-

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

THE MERCHANTS' NATIONAL BANK, &c.,
PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
} No. 218.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

THE MERCHANTS' NATIONAL BANK, &c.,
Plaintiff in Error,
vs.
THE UNITED STATES.

No. 218.

BRIEF FOR THE UNITED STATES.

This was an action brought by the United States to recover the *tax* imposed by the act of 1867, ch. 8, sec. 2 (15 Stat., 6), upon national banks, &c., for *paying out* notes of a *city*.

The act is as follows: "That any national banking association, State bank, or banker, on conviction, shall pay a tax of 10 per centum on the amount of notes of any town, city, or municipal corporation paid out by them," &c. (Rev. Stats., sec. 3413.)

In the present case the party charged with the paying out in question is a national bank, and the notes paid out were those of the city of Little Rock.

The pleadings, which consist of *complaint*, *answer*, and *demurrer*, present the question whether the above statute is constitutional, the objection (see brief for plaintiff in error, *passim*) being that the tax in question is virtually laid upon an *instrumentality* of the State of Arkansas.

There is also upon the record (p. 13) a motion in arrest of judgment, which assigns as its grounds, besides what

appears above, (1) that the act of Congress imposing the tax has been repealed, and (2) that the notes in question had been issued by the city *against law*, and were, therefore, *null and void*.

Before filing its answer, the bank demurred to the complaint for want of jurisdiction in the court, and because complaint did not state facts sufficient to constitute a cause of action. The matters therein mentioned are abandoned in the errors assigned by the plaintiff.

These *errors* are (brief, p. 24), the *allowance* of the complainant's demurrer, and the *disallowance* of the defendant's motion in arrest.

So far as the matter specified therein differs from that included in the demurrer, the motion in arrest requires little to be said; for (1) the act upon which the writ was brought has been continuously in force until the present time, as appears by the references accompanying its citation above; and (2) an objection that Congress cannot direct *national banks*, under greater or less sanctions, not to pay out *illegal* and worthless *paper* requires only to be stated to show its unreasonableness. I submit that this need not be argued.

Nor does the question as to the unconstitutionality of the act appear to be grave. Of course, the only *practical* question of that sort raised in this case is whether Congress can prohibit a *national bank* from paying out notes issued by a city. It is mere speculation to inquire here whether the act is constitutional as regards cases that may be imagined, but which do not appear upon the present record. It is not conceded that any of such cases would be difficult to deal with. The only and sufficient objection to discussing them is that they do not appear upon this record.

The brief of the learned counsel for the plaintiff in error insists that the tax in question is virtually a tax upon *the city* whose notes are concerned, and, *therefore*, a tax upon an *instrumentality of a State*, and *so* void, under many authorities cited by them from decisions by this court.

Its conclusion is, in effect, that Congress cannot regulate an *instrumentality of the United States* in any case where such regulation interferes, however remotely, with *an instrumentality of a State;* the practical application of this conclusion here being that Congress cannot *admonish* a national bank, by a tax, not to pay out—i. e., not to treat as circulating medium, or money—the notes of a city [even although *illegal* and *void*, i. e., in truth *not a State instrumentality*]. The same principle would equally avail to prevent Congress from *discouraging* national banks from *paying out* certificated extracts from city tax lists, or city tax-lien certificates, or anything else down to a policeman's star, that is at the same time, in any sense of the term, a *State instrumentality*, and susceptible of delivery across a counter.

The case of Veazie Bank *vs.* Fenno, 8 Wall., 533, establishes principles which go far beyond anything necessary to the interests of the United States in the present case. Indeed those interests seem to stand upon *first principles.* They appear to me unaffected by any one of the cases cited and discussed in the brief of the learned counsel for the plaintiffs in error, none of which, therefore, am I called upon to question.

S. F. PHILIPS,
Solicitor-General.